AS 10688

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Filed October 24, 2005
USEC Inc. (American Centrifuge Plant)	)	Docket No. 70-7004

BRIEF OF GEOFFREY SEA ON APPEAL OF LBP-05-28

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311, petitioner Geoffrey Sea hereby submits his brief on appeal of LBP-05-28, Memorandum and Order (Ruling on the Admissibility of Contentions), October 7, 2005, (served by first class mail), which denies admissibility of petitioner's contentions but with qualification permits certain late-filed new contentions. Petitioner does not argue with the allowance of late-filed contentions but seeks reversal of the decision to deny admissibility for some original contentions as specified herein. The decision should be reversed because it contravenes the Commission's obligation to implement the National Historic Preservation Act (NHPA) as governing in this licensing proceeding and as recognized by the licensing board Panel at page 45 of LBP-05-28 and by the Commission in its Memorandum and Order CLI-05-11 granting the petitioner standing.

II. BACKGROUND

The purposes of NHPA are stated at the outset of the 1966 legislation (16 USC 470(b)):

TEMPLATE = SECY-021

SECY-02

(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;

(2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;

(4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;

(5) in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation;

(6) the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development; and

(7) although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

Petitioner Geoffrey Sea is just such an "individual undertaking preservation" as envisioned and protected under the Act. Prior to USEC's selection of Piketon as site for its "American Centrifuge Plant," (ACP) he published an extensive essay in the Winter 2004 issue of the American *Scholar* that elaborates the extraordinary history of the locale on the south side of the atomic reservation in Piketon, and that pleads for a plan of restoration and national monument for that locale. (Submitted as Exhibit A along with the original petition.) In this essay, Geoffrey Sea

also explored the many and complex relationships among the constellation of historic sites surrounding the historic Barnes home.

To the west are the astounding Barnes Works, once part of the estate. To the south is the kill-site of the Sargents Pigeon, from which the bird was carried to the Barnes Home. (See petitioner's essay, Exhibit A.) To the immediate east lies the ACP site and the excavated remains of an ancient burial mound that was used as the dumpsite for a contaminated factory from West Virginia. (Id.) This land, too, was taken from the Barnes estate. To the north is the Sargent Home. Abraham Lincoln visited in 1848 because he knew the Sargent family. Two Barnes brothers were then married to two Sargent sisters, so Lincoln stayed at the Barnes Home from which he could view the earthworks. (Petition, page 16)

After publication of the essay, before USEC applied for its license to build and operate ACP, petitioner contracted to write a book about this unique intermesh of historical sites for a major publisher; he contracted to purchase the Barnes Home, where he now resides; and he researched and prepared the nomination of the Barnes Home for the National Register of Historic Places. This was done with the expressed intention of restoring the home and property; opening it to the public as a center for tourism, study and reflection. With his petition, Geoffrey Sea also submitted numerous exhibits testifying to these efforts and intentions, including: a letter from the director of the Pike County Convention and Visitors Bureau testifying to petitioner's future plans for the Barnes Home (Exhibit M); a letter from the director of Ohio Audubon about the significance to environmental history of the site of the slaying of the last wild passenger pigeon (Exhibit E); a letter from the Curator of Natural History for the Ohio Historical Society about the role of the Barnes Home in the story of the Sargents Pigeon (Exhibit D); the letter from the Ohio Historic Preservation Office that certifies the Barnes Home as qualifying for listing on the National

Register of Historic Places (Exhibit I); and an expert statement from Professor John Hancock that refers to the importance of "high-quality, non-intrusive economic development in southern Ohio") (i.e. no ACP) (Exhibit H)

III. ARGUMENT

As shown in Petitioners' contentions, USEC's Environmental Report fails to demonstrate any degree of compliance with or sensitivity to the concerns of NHPA. It does not fully identify the historic properties that may be impacted by the ACP, nor does it evaluate the ACP's impacts on those properties. And it fails to consider alternatives in the manner required by the NHPA.

Despite USEC's almost-total noncompliance with the NHPA, the Licensing Board Panel rejected all of Petitioners' contentions in LBP-05-28. Petitioner respectfully asserts that in rejecting Petitioners' contentions, the Panel has lost the forest for the trees. That is, because the petitioner presented such a wealth of information and documentation about the interlinked historic sites and potential impacts around the proposed ACP, the Panel simply missed the big picture, opting instead to train its sights on each detail in turn, at each moment forgetting the context of other facts and evidence, and how they fit together. In so doing, the Panel failed to achieve meaningful compliance with the broad purposes of NHPA in securing America's historical heritage against such encroachments as the American Centrifuge Plant.

Petitioner has referred to the historic sites and events around the proposed ACP project site as forming "a constellation." (Reply to Answer of USEC and Response of NRC Staff to Filings of August 17, page 13.) Petitioner also has reiterated that the whole process of considering qualitative impacts and assessments under NHPA authority is new to NRC and that there is obvious confusion arising from this newness. Petitioner has pointed out that contentions and notions of impact and

assessment related to compliance with NHPA are fundamentally different from those that arise under the Atomic Energy Act or even, in most cases, the National Environmental Policy Act (Ibid. and) For example, a radiological effect is easily segregated from the risk of being hit by debris. But when historical sites are connected by the very historical events that define them, and when the impacts include the discouragement of future tourism, not just physical alterations to property, no such segregation is possible. Petitioner submitted two expert statements that elaborate on this essential difference, both from Thomas F. King, who is the author of many of the implementing regulations for NHPA (found at 36 CFR 800). The Panel appears to have neglected these submissions entirely. Dr. King's reaction to LBP-05-28 is that "someone at NRC has invented a nuclear hair-splitter."

In reaching its conclusion, the Panel ignored or discounted the significant quantity of evidence presented by the Petitioner which raised a genuine and material dispute of fact with USEC regarding the impacts of the ACP on historic properties. For instance, the Barnes Home is in the direction of prevailing winds and in the direction of previous offsite migrations of uranium heaxlfluoride gas. (Petition to Intervene by Geoffrey Sea at 6.) The Barnes Home is also the site of the "maximally exposed individual" (i.e. the petitioner – *Id)* The ACP lies near a large Hopewell earthwork complex. (Petition to Intervene at 18.) Clearly, accidental radiological releases or fear of such could make the Barnes home and the Hopewell earthworks inaccessible for observation, enjoyment or study by humans for the foreseeable future.

Moreover, site preparations have also affected these historic properties. The defoliant Garlan-4 has been used to clear a ten-foot security strip along that fence-line. This procedure only started in the summer of 2003, two years after the old gaseous diffusion plant stopped production. Thus it was clearly related to preparations for ACP.

The Barnes Home is arguably (depending on the point of measurement) the nearest residence to ACP. The Barnes House is in the direction of maximum windborne contamination from ACP. It is in the direction of previous off-site migrations of UF6 from large accidental releases at the gaseous diffusion plant. It is immediately adjacent to an access road for ACP. And it is in the process of restoration as a site to attract tourists and students, hence extremely vulnerable to aesthetic and economic effects. If the Barnes Home is not considered as potentially and reasonably affected, then no historic property could ever be considered as affected by any federal project.

The Panel acknowledged but wrongfully discounted evidence presented by the Petitioner that USEC had not adequately evaluated the impacts of the ACP on historic properties. For instance, the Panel incorrectly ignored an expert declaration presented by an ancient architectural historian, an archaeologist, and a writer and researcher on electronic reconstruction of historical and archaeological sites, that "DOE well-heads, by the dozen, line both sides of the structure and some are in the midst of it. Whether pumping of water from beneath the structure damages the structure is a question that should be evaluated by hydrology experts." (Declaration by John Hancock, Frank L. Cowan, and Cathryn Long Regarding August 5, 2005 Visit to GCEP Water Field, par. 16, August 11, 2005.)

The Panel's ruling is incorrect in several respects. First, under NHPA regulations, if there are historic properties that "may" be affected by an undertaking, the effects must be evaluated. 36 C.F.R. § 800.4(d)(2). The regulations also provide that an "adverse effect is found when an undertaking *may* alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting materials, workmanship, feeling, or

association." (emphasis added). Here, Petitioner has provided sufficient evidence, in the form of a declaration by qualified experts, to create a material factual dispute with respect to the question of whether the proposed ACP may have an adverse effect on historic properties.

Another reason why the Panel's decision is incorrect is that it requires Petitioner to make his complete case at the outset of this proceeding. While Petitioner may eventually provide testimony of a hydrologist, at this stage of the proceeding it should be enough to show that an expert hydrological evaluation is needed. As the Commission has acknowledged, the NRC's pleading requirement for admissible contentions:

> Does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.

(Final Rule, Rules of Pratice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 – August 11, 1998).

Finally, the Panel improperly shifts the burden of proof from USEC to the petitioner. USEC is required to prove that all procedural requirements of the NHPA have been met before it receives a license for the ACP, including whether reasonably inquiries have been made into the potential impacts of the ACP on historic properties. Petitioner should not bear the burden of proving that the NHPA inquiry is incomplete or insufficient.

IV. DISCUSSION OF INDIVIDUAL CONTENTIONS

Contention 1.1 "USEC has failed to identify cultural resources potentially impacted by the American Centrifuge Plant."

Although the NRC Staff did not object to the admission of this contention, the Panel rejected it, based on its determination that Petitioner had not shown that USEC had failed to satisfy

10 C.F.R. § 51.45. That regulation requires an ER to identify the "environment affected" by a proposed action. According to the Panel, USEC did not need to identify "every portion of the environment which might, even in the remotest of possibilities, be affected." (page 45). Instead, the Panel reasoned, the ER "must identify only those sites that can reasonably be expected to be 'affected' by the proposed federal action, thereby alerting the Agency to the need to examine the potential impacts upon those sites." (page 45).

As USEC has recognized in the introduction to the cultural resources section of its Environmental Report, the National Register of Historic Places is the bedrock for implementation of the National Historic Preservation Act. There are two prehistoric sites already listed on the National Register in proximity to the ACP project site – the Barnes Works and the Piketon Works. There is also one historic site bordering on the project site – the Barnes Home – that has been determined to qualify for the National Register and is therefore entitled to the same protections under NHPA. There are at least three other sites proximate – the Sargent Home, the Rittenour Home and the kill-site of the Sargents Pigeon – that would qualify for the National Register but for the fact that they have not yet been nominated. (Under NHPA it is the agency's responsibility to identify eligible sites even if they have not been formally nominated.) *USEC did not even mention any one of these sites in the section of its ER devoted to cultural resources.*

The Panel, in LBP-05-28, tortures logic to reverse this conclusion. First the Panel argues that the absence of mention does not imply a failure of consideration. (page 45). So, supposedly, according to the Panel, USEC might have considered and evaluated all of these sites, but ruled them out as "not reasonably affected" and therefore chose not to mention any of them.

If this logic were to prevail, it would effectively eliminate the obligation of license applicants to identify affected properties and then assess them under 10 CFR 51.45(b). Applicants

could always remain silent about affected sites, hope that no one notices, and then, if someone does notice, claim post-hoc that those sites were indeed identified, assessed and eliminated, all in secret. Indeed, the public purpose of an Environmental Report is to lay the procedure for identification and assessment out for public review. Otherwise, why have an ER or a section on cultural resources? Only the final conclusions would need be published.

The Panel's logic also ignores the basic premises of NHPA. NHPA established the National Register of Historic Places, in part to formalize the procedure for impact assessment. Properties that are listed on or that are determined to qualify for the Register, are protected, and this is part of what justifies the difficult process of getting a property listed. In doing any cultural resource assessment under NHPA, the very first step, always, is to identify those properties listed on the Register, or eligible to be listed. That's what NHPA is all about. The Panel ignores that procedure, applying instead a logic that comes from NEPA assessment, where there is no true equivalent of a formalized list of protected properties.

But even under NEPA there is a rough equivalent in the endangered species list. Species on the list are inherently protected, therefore the first task of environmental assessment is to identify those species on the list. USEC follows this procedure in its ER section on environmental assessment. It would be hard to imagine, and utterly inexcusable, if an applicant failed to mention a nearby species on the endangered species list, and then later claimed that this failure was because the assessment showed no impact. Transparency is required, so too with NHPA.

The Panel states (page 45): "We do not believe that the mere presence of historic or cultural resources in close proximity to the proposed activity, standing alone, requires a description in the ER." It goes on to state that "the ER must identify only sites that can reasonably be expected to be 'affected'...."

Procedurally, the Panel's logic is backward. They seem to conclude that USEC did not have to identify the petitioner's property, because the petitioner ultimately failed to proffer an admissible contention demonstrating impact. But how would USEC know in advance that such a contention would not be filed? And, short of intervention, the petitioner is also a consulting party in NRC's Section 106 review. Consulting parties have the right to discuss and achieve mitigation for impacts that may fall short of the required documentation for intervention. Yet these are still "reasonable impacts" and so, such a property must be identified in the ER. Indeed, in its May 12 order awarding standing to the petitioner, CLI-05-11, the Commission made clear that "there is an obvious potential that those residing within one mile of the proposed American Centrifuge Plant may be affected by the construction, operation, and decommissioning of the facility." (page 4.) Surely if the Commission regards the potential for effect to be "obvious," USEC should not be able to rule out the possibility of impact *a priori*, without so much as identifying the property in question. (The Commission made clear that its ruling applied to both health and property interests CLI-05-11, page 7.)

Next, the Panel rejects this contention because, if it were admitted, says the Panel, it would be obviated by the current activities of the Staff in assessing historic properties. The Panel argues that it and the staff have now "been made aware" of the properties in question. (page 47.) Petitioner points out that this awareness was produced only by the fact of a petition of intervention. Such an argument could thus lead to the dismissal of <u>any</u> contention by the following chain of events: 1. Applicant's application and ER contain some serious defect, 2. An affected party files a petition of intervention raising the defect as a material dispute proper for hearing, 3. The petition is denied because the Panel and Staff were made aware of the issue and are correcting the matter on behalf of the Applicant. Thus petitioners would always be denied the rights of intervenors

including the right to a hearing on properly framed contentions.

It is not only a procedural problem. The petitioner's dispute is with USEC, not with NRC staff or the Panel. Petitioner contends that USEC's failure to identify any historic property in the locale was not just an administrative oversight to be corrected by post-hoc identification. Rather, Petitioner alleges that USEC is manifestly and grossly insensitive to historic property owners on its fence-line. NRC staff and the Panel will be gone from the picture after licensing. Then the property owners are left to deal with USEC for decades – the same entity that failed to acknowledge our existence. This is the material dispute at issue, not the paper problem that preoccupies the Panel. That material dispute – USEC's utter neglect of its neighbors – merits hearing.

As to the paper problem, though, the Panel again gets the timing backwards. That the Staff and Panel are now "aware" of the properties does not cure the harm done by USEC's original neglect. Because the historic properties were not identified by USEC, no initial reviews of the project, including reviews by the State Historic Preservation Office and by consulting parties, could account for them. Deadlines passed. New petitioners, like the new owners of the Sargent Home who never were notified by USEC or anyone else, now have a mountain to climb in terms of getting their concerns heard. NRC Staff now considers its Section 106 process to be closed, or nearing closure. Thus the Panel's "awareness" comes just as the window for effective contention of the issues at hand closes. The only way to resolve the disputes in keeping with the broad purposes of NHPA is to admit petitioner's contention and allow the dispute to be heard at hearing.

Contention 1.2 "USEC has failed to identify potential impacts of the American Centrifuge Plant on nearby historic and prehistoric sites."

The Panel faults petitioner for merely providing "a list" of potential adverse impacts by

ACP on nearby historic properties, rather than offering "any expert testimony or factual support." (LBP-05-28 at page 48, citing 10 C.F.R. §§ 2.309(f)(v) and (vi).) As discussed above with respect to Contention 1.1, however, Petitioner did submit a large amount of factual evidence of impacts of the ACP on historic properties in the area. The evidence includes expert declarations submitted by Petitioner on August 17, 2005. *See* Exhibit AA (expert declaration regarding potential impacts of ACP on earthworks). While a significant amount of this evidence does consist of expert testimony, those portions of the evidence that do not constitute expert testimony are also acceptable, because they constitute documentary evidence from the Environmental Report or other document, pictoral evidence, or the first-hand observations of the Petitioner. 10 C.F..R. § 2.309(f)(2) ("Contentions must be based on documents or other information available at the time the petition is to be filed . . . "). As the Commission has previously stated, expert testimony is not required at the contention-pleading stage:

> The Commission expects that at the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.

(54 Fed. Reg. at 33,171.)

The Panel also disputes the significance of Petitioner's evidence in support of the contention, stating that a photograph of an entrance to the ACP is "not as dramatic" as Petitioner's description. (page 48). But this amounts to weighing of evidence and a judgment on the merits of the contention, which is not allowed. *Sierra Club v. NRC,* 862 F.2d 222, 228 (9th Cir. 1988). Moreover, the Panel unfairly penalizes Petitioner for the lack of information provided by USEC regarding the entrance.

But the Panel is silent about the two strong cases of impact that the petitioner clarified and expanded upon in multiple filings following the original petition, in part by cross-reference to other

parts of the petition and exhibits, in part by late-filed bases for contentions that the Panel claims to have considered – impacts on the Barnes Home property itself and on the earthwork now identified on federal USEC-leased land at the Water Field site. There are extended discussions of these two cases of impact in Petitioner's replies to USEC and NRC Staff, in Petitioner's Amended Contentions, and in Petitioner's Reply to Answer of USEC and Response of NRC Staff to Filings of August 17. A review of these three filings will show that petitioner supplemented his "list" at great length, including many facts and citations to expert opinion, including most importantly the **Declaration by John Hancock, Frank L. Cowan, and Cathryn Long Regarding August 5, 2005 Visit to GCEP Water Field.**

These three cultural resource experts and myself (with a fifth participant) gained access to the Water Field site on August 5, only after long and extreme resistance by USEC to the visit. (USEC leases and controls the site.) There we located an ancient linear earthwork directly underneath USEC well-heads. The experts concluded, in part:

> 15. A research protocol is needed to determine the identity and age of this structure. That protocol should begin with access to all previous reports of cultural resource investigations conducted at the Water Field property prior to the development of the Water Field, investigations that would have been required by Section 106 of the National Historic Preservation Act. Access will also be needed to the maps and survey records for the Water Field Site in possession of the DOE and USEC. This should be accompanied by historical research to determine if any known engineering work took place in that area prior to the DOE land purchase, and if the structure was noted on any older survey maps or in any archeological works. If the historical research draws a blank, a cross-sectional excavation of the structure and/or a series of soil cores through the structure would reveal much about its age and identity. (JH, FLC, CL)
>
> 16. If the structure is determined to have historic significance, an evaluation should be made of the visual and physical impact of the American Centrifuge Project on that structure. DOE well-heads, by the dozen, line both sides of the structure and some are in the midst of it. Whether pumping of water from beneath the structure damages the structure is a question that should be evaluated by hydrology experts. Further surveys of the entire Water Field Site, with maps, cameras, survey equipment, and unrestricted time are also warranted. (JH, FLC, CL)

17. The GCEP Water Field site lies close enough to the Barnes Works to warrant a close examination of its historic significance. Any prehistoric earthworks that may be identified at that location deserve the utmost attention and protection. Therefore, we urge a program of research at that site as rapidly as possible, in compliance with federal preservation law. (JH, FLC, CL)

Certainly, petitioner has here met his obligation to show that there is a threatened impact of ACP on prehistoric resources, that may be a part of a National Register site, located on federal land to be utilized by the project in question. So that discovery on this issue of material dispute may take place and a hearing conducted, this contention should be admitted.

Regarding the Barnes Home itself, petitioner has clarified above that multiple exhibits introduced first on the question of standing, speak to the many potential impacts on the property, something that the Panel neglects almost entirely. Petitioner's Reply to Answer of USEC and Response of NRC Staff to Filings of August 17 contained the following at pages 12-14:

> The photograph showing a part of the entrance gate to the southwest access road and the Barnes Home, is not part of a new contention. It was filed as a supplement to the material already presented with the original petition. That material included an expert statement from Professor John Hancock, Professor of Architecture at the University of Cincinnati. That statement included the following passage:
>
> "The preservation of this site [the whole Barnes Works including the major portion of the former Barnes estate] has at least two major benefits:....it will strengthen the resource base for the increasingly lucrative cultural heritage tourism industry and the potential for its associated *high-quality, non-intrusive economic development in southern Ohio.*"
>
> By "non-intrusive economic development," Professor Hancock did mean: not involving putting roads and gates with fluorescent orange and yellow warning signs in immediate proximity to historic National Register sites that are being developed for tourism and public education. (Petitioner also provided a wealth of information about the historic value and importance of the Barnes Home and his plans to develop it as a site for tourism.) There are only so many ways to say it, and Professor Hancock said it: ACP will impact the constellation of historic properties on its boundary (consisting of the Barnes Home, the Sargent Home, the Rittenour Home, The Sargent Pigeon kill-site, the Barnes Works, and associated earthworks). These impacts are physical, aesthetic and economic and are precisely those sorts of impacts that the National Historic Preservation Act was enacted to prevent and modify. As to

> the timeliness of the photograph, since the road and gateway are undergoing a constant process of modification and "upgrade," Petitioner was justified in submitting a photo that was taken as near to filing as possible. . . .
>
> There is a genuine issue of fact regarding the impacts of ACP on surrounding historic properties. These impacts cannot be quantified in the same manner as, say, the radiological impact of plant emissions. Petitioner submitted two expert statements from Thomas F. King, who is the principal author of Section 106 of NHPA, that speak to the difference between easily quantified impacts as assessed under NEPA, and qualitative impacts that generally arise under NHPA. The standards used for admitting one type of impact cannot be applied to the other. Petitioner has certainly met his burden with regard to admissibility of his contention on impacts.

Petitioner would like to remind the Commission that in its order CLI-05-11 granting standing, the Commission noted that in an enrichment plant licensing action there is no presumption of standing based on geographic proximity absent a specific determination of "an obvious potential of offsite consequences." (page 3). It further stated: "The Commission agrees with the NRC staff that there is an obvious potential that those residing within one mile of the proposed American Centrifuge Plant may be affected by the construction, operation, or decommissioning of the facility." (page 4). It would be bizarre if the petitioner, who has the additional vulnerability of damage to historic property and property values, of future diminution of his use of his property, and who has, in fact been identified as the MEI (Maximum Exposed Individual) by USEC according to its ER description, and who has presented numerous facts and expert opinions to demonstrate the possibility of those effects, were denied admissibility on the mere grounds that he neglected to include some of the references in the right space on his original petition.

Contention 2.1 "The USEC-DOE collaborative arrangement is out of compliance with the National Historic Preservation Act and related legislation."

To the extent that the Panel's ruling leaves open the possibility for late-filed contentions based on review of the Draft Environmental Impact Statement, petitioner raises no objection and plans to so file. However, the Panel also finds that the issue is "beyond scope" and that the contention "is not supported by material facts of expert opinion." To these assessments, petitioner strongly objects.

The question of the Department of Energy being "beyond scope" has been raised repeatedly throughout these proceedings. Petitioner has likewise often clarified that he understands that NRC cannot regulate DOE. Such regulation is NOT what petitioner has in mind.

ACP is proposed to operate in buildings and on land leased from DOE, with virtually all infrastructure at the site provided by DOE. Additionally, ACP is the continuation of a project begun by DOE called the Gas Centrifuge Enrichment Plant (GCEP). Petitioner has argued that for the purpose of defining the "federal action" that triggered NHPA review obligations, that action was the inception of the GCEP program, which then evolved continuously into ACP. Because of this unique history, it is simply impossible to discuss ACP without also discussing the GCEP precursor to ACP. Discussion does not necessitate regulation.

An analogous situation is the privately operated MOX facility at DOE's Savannah River site. In conducting environmental reviews of MOX, NRC is reliant almost entirely on information provided by DOE about the site. Similarly then, in conducting an NHPA review of ACP, NRC must necessarily rely on information about DOE's NHPA compliance or non-compliance during the GCEP period and the period of transition from GCEP to ACP. If we don't know what DOE did or did not do during the first twenty five years of the centrifuge program at Piketon, we can't then come to any conclusions at all about NRC's NHPA compliance. It was one continuous program, even though it shifted from governmental to private control.

To demonstrate the inextricable and confused relationship between USEC and DOE,

petitioner submitted the March 2005 Audit Report of the Gas Centrifuge Enrichment Plant Cleanup Project at Portsmouth (Exhibit A to Amended Contentions). This report by the DOE Office of Inspector General concluded that the division between DOE and USEC activities in the GCEP/ACP buildings at Piketon is unclear, and that $17 million in USEC private expenses have been improperly paid by DOE. This is a crucial fact, and expert opinion, because it shows that one can't separate USEC from DOE at Piketon at the current time. Therefore, if one rules all mention of DOE "beyond scope," it leads to the absurd step of ruling USEC's ACP activities beyond scope. The activities are merged, even if illegally, therefore NRC's analysis must look at DOE, stopping short of regulation.

Even more obviously, petitioner supplied the aforementioned expert declaration of Cowan, Hancock and Long. This declaration showed that on what is called the GCEP Water Field site, which was acquired to supply GCEP with water and now will do the same for ACP, there has been effectively no program of NHPA compliance since the site was acquired in 1983. Petitioner's contention was phrased to account for this situation, which cannot be described or understood without understanding the continuous history of DOE's GCEP and USEC's ACP.

Thus petitioner has presented a material dispute about legal compliance that is not beyond scope, with supporting expert opinion. The contention should be admitted as it stands, preserving the possibility of later supplementation.

Contention 2.2 "Noncompliance with federal preservation law has undermined the legitimacy and legal basis of the USEC-DOE agreement."

For the aforementioned reasons, petitioner rebuts the Panel's opinion that "DOE's activities, however, are entirely outside the purview of this board." The Board cannot meet its obligation to

review USEC's proposed project without also reviewing the precursor to it, which happened to be operated by DOE.

Contention 3.1 "USEC has failed to consider a broad range of alternatives to the proposed action."

The Panel rejected this contention because it suggests consideration of alternatives that are "beyond those reasonably related to the purposes or goals of the proposed project," (LBP-05-28 p. 53). The Panel's decision is in error, because it focuses only on NEPA's requirements for the consideration of alternatives and does not address the NHPA's requirements for consideration of alternatives, which is also called for in the contention. (Contentions on the Construction Permit/Operating License at 29.)

This is a clear case of USEC, the Staff and the Panel failing to appreciate the distinction of an NHPA dispute. As petitioner has noted in his replies to USEC and NRC Staff and in his Amended Contentions, Petitioner is referring primarily to the NHPA concept of alternatives, not the NEPA concept. The NHPA concept of alternatives is fundamentally different in that the alternatives required to be considered are those that do a better job of preserving and protecting threatened cultural resources, not those that further the goal of the proposed action. In 36 CFR 800.6(a) this is spelled out: "The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties." It is instructive that the word "alternatives" was added to the year 2000 regulations, whereas the language of the 1986 regulations was limited to "modifications." The purpose of the change was to make clear that considered alternatives might

be radically different from the proposed action even as to purpose or aims.

Under special circumstances, this interpretation of alternatives has been held to apply under NEPA as well, where the purposes of a proposed project and the aims of environmental protection are found to be inimical. This is such a case – you can't both build a uranium enrichment plant and erect a center and monument that memorialize the mound-building cultures and the passing to extinction of the passenger pigeon. It's one or the other. Petitioner spelled this out most clearly in his first reply to the NRC staff, on pages 26-29, where he wrote (in part): "Courts have held that the preclusion of alternative uses can constitute a public harm under NEPA. For example, in *Delaware vs. Penn Central*—an unusual case like the one at hand because two public agencies were battling each other—the Court found that the defendant's planned fill operation would be injurious in fact, as it would "make the land unusable for the purposes presently planned by the State and the County." (33 FSupp at 492, 1 ELR 20105—D. Del. 1971)"

Neither USEC, the Staff or the Panel has grasped or responded to this argument – that the fundamental incompatibility of USEC's proposal with Petitioner's published proposals (predating those of USEC) require a very different approach to the consideration of alternatives, as has been upheld in federal courts.

To be sure, the NHPA process for considering alternatives kicks in only when there is a dispute with a consulting party that is not otherwise resolvable. But that is the case here. Petitioner is a consulting party. Petitioner has clearly stated that his preservation plans are incompatible with USEC's proposed ACP. USEC had access to petitioner's published preservation goals even before it chose Piketon as a site for ACP. USEC therefore should have considered petitioner's proposals in its consideration of alternatives, under both NEPA and NHPA.

Contention 3.2 "USEC's stated action alternatives should be seriously considered"

Essentially, the Panel rejects this contention because USEC does consider alternate siting of the ACP at Paducah in its ER. Therefore, the Panel fails to detect the dispute. Quite simply, USEC did not do a valid comparison of the impacts on cultural resources at the two sites, precisely because USEC failed to identify the sensitive historic sites at Piketon and the impacts upon them, as elaborated in petitioner's contentions 1.1. and 1.2. Without identifying these sites and impacts, USEC could conduct no valid comparison between the sites. Alternatively, once the sites and impacts at Piketon are identified, a valid comparison with the Paducah site as regards cultural resource impact then becomes imperative.

Without having found significant impact differences between Piketon and Paducah, USEC claims it chose Piketon on the basis of "financial considerations." As argued in petitioner's original contention, this represented the triumph of a private business decision over public interest. Reversing that decision and imposing the move as a condition of the license constitutes the heart of the dispute, which should be heard at hearing.

V. CONCLUSION

For the foregoing reasons, the ASLB erred when it ruled petitioner's contentions 1.1, 1.2, 2.1, 2.2, 3.1 and 3.2 inadmissible. LBP-05-28 should be reversed and the contentions should be admitted.

Respectfully submitted,

Geoffrey Sea Esq

Geoffrey Sea

October 24, 2005

Geoffrey Sea
The Barnes Home
1832 Wakefield Mound Road
Piketon, OH 45661

Tel: 740-289-2473 Cell: 740-835-1508 E-Mail: SargentsPigeon@aol.com

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Filed October 24, 2005
USEC Inc. (American Centrifuge Plant)	)	Docket No. 70-7004

CERTIFICATE OF SERVICE

I hereby certify that copies of **BRIEF OF GEOFFREY SEA ON APPEAL OF LBP-05-28** in the above-captioned proceeding have been served on the following by deposit in the United States mail, and by electronic mail on this 24th day of October, 2005.

Administrative Judge Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, DC 20555
lgm1@nrc.gov

Administrative Judge Dr. Paul B. Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, DC 20555
pba@nrc.gov

Administrative Judge Dr. Richard E. Wardwell
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, DC 20555
rew@nrc.gov

Susan C. Stevenson-Popp, Esq., Law Clerk
U.S. Nuclear Regulatory Commission
Atomic Safety & Licensing Board Panel
Mail Stop: T-3 F23
Washington, DC 20555

scs2@nrc.gov

Office of the Secretary
Attn: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
hearingdocket@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555

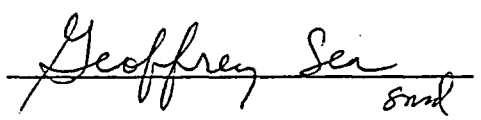
Lisa B. Clark, esq., Margaret J. Bupp, esq., Sara E. Brock, esq.
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555
lbc@nrc.gov, mjb5@nrc.gov, seb2@nrc.gov

Dennis J. Scott, esq.
USEC, Inc.
6903 Rockledge Drive
Bethesda, MD 20817
scottd@usec.com

Donald J. Silverman
Morgan Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20005
dsilverman@morganlewis.com

Vina K. Colley (PRESS)
3706 McDermott Pond Creek
McDermott, OH 45652
vcolley@earthlink.net

Ewan Todd (PRESS)
403 E. Oakland Avenue
Columbus, OH 43202
ewan@mathcode.net



Geoffrey Sea, Petitioner